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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-016442 12/09/2011

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

STATE OF ARIZONA, et al.

COLLEEN CONNOR

v.

COLLEEN MATHIS, et al.

KIERSTEN A MURPHY

JEAN JACQUES CABOU
ROOPALI HARDIN DESAI
TIMOTHY A NELSON
MARK D WILSON
ANDREW S GORDON
THOMAS PURCELL LIDDY
JOSEPH KANEFIELD
BRUNN W ROYSDEN JR.

UNDER ADVISEMENT RULING

Following oral argument on November 16, 2011, the Court took under advisement the State's Motion to Dismiss in consolidated case number CV2011-017914, the Arizona Independent Redistricting Commission's Motion for Summary Judgment and related Joinders in this case number, and the State's Cross-Motion for Summary Judgment. The Court notes that subsequent to oral argument in this matter, the Court received Commissioner Herrera's Response to State's Cross-Motion for Summary Judgment and Joinder in Commissioner McNulty's Response to State's Cross-Motion for Summary Judgment, and the Court has read and considered the document. The Court has also read and considered Commissioner Mathis's Notice of Supplemental Authority filed November 29, 2011. The pending matter and the briefing

herein raise a number of difficult issues of first impression. Upon further consideration of the case file and arguments presented by the parties, the Court is now prepared to rule.[1]

The Court begins by denying the State's motion to dismiss. Standing in Arizona courts is prudential rather than jurisdictional.[2] Waiver of the requirement of standing, although exercised with great reluctance, is permissible in exceptional circumstances, generally in cases of critical public importance that are likely to recur and where the issues are sharply presented to the Court. *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 24-25 (1998). Such is clearly the situation here. Whether the Independent Redistricting Commission ("IRC") is subject to the Open Meeting Law must necessarily be faced in one way or another. To resolve the question at the earliest possible opportunity is plainly in the public interest. The Court therefore need not address whether the limited jural status of the IRC enables it to seek a declaratory judgment protecting its constitutional authority and independence, as the Court determines to allow the suit to proceed regardless. *Johnson v. Tempe Elementary School Dist. No. 3 Governing Bd.*, 199 Ariz. 567 (App. 2000), first raised at oral argument, leads to a trap of circularity. In that case, the Court of Appeals dismissed an appeal approved by the school board in executive session on the ground that its action violated the Open Meeting Law, *id.* at 570 ¶ 15. The opinion is on point only if the IRC is governed by the Open Meeting Law, which is precisely what this lawsuit was filed to determine. For the purpose of this motion, the Court must assume that the allegations made in the complaint are true and determine if the plaintiff is entitled to relief under any theory of law. *Grand v. Nacchio*, 222 Ariz. 498, 500 ¶ 6 (App. 2009). Because the IRC is entitled to seek relief under its theory that the Open Meeting Law does not apply, the action cannot be dismissed. The Court therefore does not consider an evidentiary hearing on the IRC's decision to file this lawsuit to be necessary.

The constitutional status of the Independent Redistricting Commission is unique in Arizona. It is established in the same section, Art. IV Pt. 2 § 1, as the House and Senate. Unlike

[1] The Court also received a Request for Judicial Notice, filed November 15, 2011, seeking that this Court take judicial notice of a brief filed by the Arizona Center for Law in the Public Interest in a related matter pending before the Arizona Supreme Court. To the extent that the Supreme Court's ruling in that case that Ms. Mathis's actions did not constitute grounds for removal bears on the question, which the Supreme Court deliberately left to this Court, of whether the Open Meeting Law applies to the IRC, that ruling speaks for itself (and will no doubt speak even more clearly when released in full). The ACLPI's brief to the Supreme Court, eloquent and apparently effective as it was in arguing the issue then at bar, does not address itself to the distinct issue presented here. The Court therefore believes that the ACLPI's brief is unnecessary to the Court's ruling, and denies the request to take judicial notice on that ground.

[2] The State's citation of *Yamamoto v. Santa Cruz County Bd. of Supervisors*, 124 Ariz. 538, 539 (App. 1979), is inapposite because it deals with non-jural entities as defendants, not as plaintiffs. The due process concerns implicated in asserting jurisdiction over an unwilling non-jural defendant are naturally not present when the non-jural entity itself invokes the court's jurisdiction.

other commissions and boards established in the Constitution, the legislature is not expressly empowered to enact rules for it; instead, detailed rules are laid down in the Constitution itself.[3] The rule relevant here, which governs the conduct of its business, is set forth at § 1(12): "Three commissioners, including the chair or vice-chair, constitute a quorum. Three or more affirmative votes are required for any official action. Where a quorum is present, the independent redistricting commission shall conduct business in meetings open to the public, with 48 or more hours public notice provided." (To distinguish this from the Open Meeting Law, the Court will refer to it herein as the "Open Meetings Clause," or simply the "Clause.") There is no dispute that the Clause is binding on the IRC. The question is whether the legislature may bind the IRC to rules more stringent than those in the Clause.

As the State points out, the Open Meeting Law, A.R.S. § 38-431 et seq., was already on the books when the amendment creating the IRC was passed. Had the voters wished for it to apply to the IRC, they could have incorporated it by reference or by reiterating its requirements in the Constitution, or by authorizing the legislature to prescribe additional rules. Instead, they wrote entirely new open meeting language, more stringent in some respects (for instance, requiring 48 instead of 24 hours notice of public meetings) and less stringent in others.[4] When interpreting a constitutional provision, the Court's "primary purpose is to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it." *Heath v. Kiger*, 217 Ariz. 492, 495 ¶ 9, 176 P.3d 690, 693 (2008) (internal quotation and alteration omitted). The Court must assume that the voters knew what they were doing and

[3] By contrast, Art. XV § 6, dealing with the Corporation Commission, lays down no rules, but expressly empowers the legislature to "prescribe rules and regulations to govern proceedings instituted by and before it." And Art. XI § 3 provides that the powers and duties of the State Board of Education "shall be such as may be prescribed by law."

[4] The State argues that to the extent the Open Meetings Clause does not provide for a mechanism for going into executive session – as the Open Meeting Law does – the IRC necessarily violates the Clause when it has gone into executive session to receive legal advice. First, the Court notes that the use of executive session to receive legal advice was not an alleged underpinning of any of the State's requested relief in this matter. Second, while the Court is initially drawn to the facial logic of the State's argument, the Court agrees with the IRC that the ability to receive legal advice that is protected by the attorney-client privilege is a fundamental matter that necessitates executive session ability. At the time Prop. 106 was enacted, the Arizona courts recognized that, where openness in government conflicts with the necessity for public officials to engage in full and free discussion of legal matters with counsel in private, confidentiality prevails even in the absence of an express statutory exception. *Gipson v. Bean*, 156 Ariz. 478, 482 (App. 1987) (review denied 1988); *see also State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 299 ¶ 33 (App. 2006). It would be incongruous for the voters to have given the IRC the right to hire counsel as part of Prop. 106, but not the concomitant right to receive confidential advice from that counsel. Based on this need, courts in other jurisdictions have read exceptions into open meeting requirements to allow for such confidential communications. *E.g., Sacramento Newspaper Guild v. Sacramento Cnty. Bd. of Supervisors*, 69 Cal. Rptr. 480, 487-92 (Cal. Ct. App. 1968); *Oklahoma Ass'n of Mun. Attorneys v. State*, 577 P.2d 1310, 1315 (Okla. 1978). The Court finds those authorities to be persuasive here.

give full effect to their judgment. The Open Meetings Clause they enacted is not coextensive with the Open Meeting Law.[5]

Apparently conceding that application of the Open Meeting Law impinges upon the independence of those subject to it, the State argues that the statute does not intrude upon, but is harmonious with, the rationale for the IRC's creation. According to the State, the voters were concerned, not with self-interested political influence over the crafting of electoral districts, but with the lack of transparency in the process; because the Open Meeting Law promotes the goal of transparency, it is harmonious with the Open Meetings Clause. The State does not explain why, if such was the voters' intent, they did not simply order the legislature to abandon its "smoke-filled back rooms" and conduct its redistricting openly. To the contrary, the voters went to extraordinary lengths to insulate the IRC from politics, excluding both current and former elected officials down to the entry-level precinct committeeman (and barring commissioners from holding office until the next commission is appointed) and specifically prohibiting the drawing of districts around the residences of incumbents or potential candidates.[6] In contrast to the comprehensive exclusion of political influence is the general language of the Open Meetings Clause. Had the abhorrence of smoke-filled rooms motivated them, the voters would surely have laid down equally restrictive rules to guarantee visibility, especially when they had the exemplary text of the Open Meeting Law readily at hand. The Court can only conclude that, while openness was important as reflected by the inclusion of the Open Meetings Clause, more important was insulating the IRC from interference by the political branches.

Applying the Open Meeting Law to the IRC would subject it to political influence from two sources. The first source, obviously, is the legislature. If the legislature can, through its plenary legislative power, dictate how the IRC is to conduct its business and impose penalties for

[5] Counsel for the Maricopa County Attorney's Office, which has taken over this case in light of the Attorney General's conflict of interest, informed the Court that it is not pursuing a summary judgment ruling as urged by the Attorney General that serial communications violate the Open Meeting Law. The Court observes that this theory is supported only by a 1975 Attorney General's opinion, which is to date not supported by any published opinion and which naturally does not address the Open Meetings Clause. Further, as discussed in the Notice of Supplemental Authority filed by Commissioner Mathis on November 29, 2011, it appears that the Arizona Supreme Court has concluded that serial communications are not a violation of the Open Meeting Law, although we do not yet have the benefit of the Supreme Court's written opinion on the topic. To the extent the Supreme Court does so hold, however, even if this Court found that the Open Meeting Law applied to the IRC, it would appear that the State has not stated "reasonable cause to believe there may have been a violation" of the Open Meeting Law. A.R.S. § 38-431.06. Accordingly, even if the Open Meeting Law applied, the Court would correctly dismiss the State's action on that basis.

[6] The Constitution also limits the grounds for removing a commissioner to specified non-political ones. The Supreme Court has recently ruled that the existence of one or more of the enumerated grounds is not a political question, although it has not yet explained its reasoning. *Arizona Independent Redistricting Comm. v. Brewer*, No. CV-11-0313-SA (filed 11/17/2011).

non-compliance, that power cannot be limited to open meetings; it can be used to harass and hamstring the IRC. The second source is the executive, specifically prosecutors such as the Attorney General and the various county attorneys, all of whom are empowered to investigate alleged Open Meeting Law violations. The threat of prosecution, even a baseless one, can be reasonably expected to intimidate its target.

The Court therefore concludes that the Open Meeting Law, A.R.S. § 38-431 *et seq*., cannot be applied to the Independent Redistricting Commission.[7] This leads to a second question: does the prosecutorial authority of the State extend to enforcement of the Open Meetings Clause, beyond the authority possessed by any citizen of Arizona to compel compliance by filing a special action?

The Open Meetings Clause contains no enforcement mechanism. Nor does it prescribe any penalty for noncompliance, other than removal by the Governor with the consent of two-thirds of the Senate, to the extent that the noncompliance constitutes "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." Ariz. Const. art. 4, pt. 2 § 1 (10). Even if there is a violation, then, there is nothing for the prosecutor to prosecute.

Beyond that, the doctrine of legislative immunity protects the official acts of the IRC and individual commissioners. The doctrine of immunity for the performance of legislative acts is one long predating statehood. *See Gravel v. United States*, 408 U.S. 606 (1972) (outlining its history in common law). It applies to "actions that are an integral part of the deliberative and communicative processes utilized in developing and finalizing a redistricting plan, and when necessary to prevent indirect impairment of such deliberations." *Arizona Independent Redistricting Comm. v. Fields*, 206 Ariz. 130, 139 ¶ 24 (App. 2003) (internal quotation marks omitted). Contrary to the State's argument, the choice of a consultant is a legislative, not an administrative act, even though some preliminary and follow-up work may be delegated; the allegation here is that three commissioners improperly agreed on the choice of consultant, not on the application process or the contractual compensation of their choice. *See id.* at 140 ¶ 29-30. The "deliberative and communicative processes" involved in choosing the consultant are therefore necessarily privileged.

The State makes another argument against the application of legislative immunity: only "legitimate" communicative processes compliant with the Open Meetings Clause (or Law) are entitled to immunity. The threat is in the corollary expressly stated at oral argument: the Attorney General, in the first instance, decides what communicative processes are "legitimate." The premise that legislative immunity does not exist until the entitlement to it is accepted by the

[7] Nothing prevents the IRC from using the Open Meeting Law as persuasive authority for interpreting the Open Meetings Clause, as it apparently has done on occasion. It is not obligated to accept its guidance, however.

executive branch (or presumably by the court, should the matter get that far) is wholly inconsistent with the overarching separation of powers.

The State's argument that immunity would open the door to evils like bribery and embezzlement is not persuasive. Legislative privilege does not shield those who misuse public office for personal gain. But no such accusation has been made against any of the IRC commissioners. The allegations against them are that they failed to perform their official legislative acts in the proper manner. This is fully within the scope of the privilege.

Therefore, the Court finds that the Open Meeting Law, A.R.S. § 38-431 *et seq*., does not apply to the IRC, which is governed instead by the open meetings language of Article IV Pt. 2 § 1(12) (the Open Meetings Clause). It further finds that neither the Attorney General nor the Maricopa County Attorney may proceed in their investigation, except as provided by the Rules of Procedure for Special Actions.

For the foregoing reasons, as well as others expressed by the IRC and the individual commissioners in their briefing and argument, the Motion for Summary Judgment filed by the IRC and joined by Commissioners Mathis, McNulty, and Herrera is granted. The State's Cross-Motion for Summary Judgment is denied.

Accordingly,

IT IS HEREBY ORDERED that no later than December 15, 2011, counsel shall lodge a form of order for the Court's signature consistent with this ruling, and including the declaratory relief requested in the IRC's pleadings. The form of judgment should be simple and narrowly tailored to the relief requested. Preferably, the parties will stipulate to the form of the judgment, but if no agreement can be reached counsel for the IRC will lodge a proposed form of judgment, which the Court will hold for the requisite period for any objections.